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No. 83-2148

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, et.al.,

Petitioners,

v.

KLAMATH INDIAN TRIBE

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

The Tribe's argument to this Court is fundamentally flawed. It ignores or attaches no significance to the critical analytical factors that must be considered in a proper resolution of this case.

The ultimate issue in this case is whether the State Department of Fish and Wildlife (the State) has the authority to regulate Klamath Tribe members' fishing, hunting and trapping on approximately 970 square miles of land formerly part of the Klamath Indian Reservation (*i.e.* the ceded lands). The correct analysis of this case compels the conclusion that the State can regulate wildlife gathering on the ceded lands because: (1) the 1906 Cession Act diminished the reservation boundaries; (2) the rights exclusively to fish, hunt and trap were limited in the 1864 Treaty to lands within the reservation; and (3) the Cession Act contained no language restoring these rights to the Tribe on the ceded land.

The respondent Tribe ignores or dismisses as irrelevant the above factors. The Tribe urges upon this Court a wholly different analysis for resolving the ultimate issue. The approach employed by the Tribe and the Ninth Circuit in this case mistakenly focuses on whether retention of fishing, hunting and trapping rights is inconsistent with the purposes of the Cession Act and the subsequent uses of the ceded land and whether Congress manifested a clear intent to take away these rights on the ceded land. The Tribe contends that its analysis is founded upon Article IV of the Cession Act and

decisions of this and other courts. Neither Article IV nor the decisions cited, however, support the proferred analysis.

The Tribe's reliance on Article IV of the 1906 Cession Act is based upon the Tribe's substitution of the term "purposes" for the term "provisions," contained in Article IV. Article IV impliedly referred back to the 1864 Treaty and provided that "nothing in this agreement shall be construed to deprive" the Tribe "of any benefits to which they are entitled under existing treaties, not inconsistent with the *provisions* of this agreement." 34 Stat. 366 (Pet. for Cert., App. D) (emphasis added). Contrary to the Tribe's assertions and contrary to the Ninth Circuit's interpretation, Article IV did not preserve all treaty rights not inconsistent with the purposes of the Cession Act or the subsequent uses of the ceded land. It merely reserved to the Klamath those treaty rights that were not inconsistent with the provisions of the 1906 Act. The clear import of Article IV, therefore, was to leave intact the Tribe's remaining rights under the 1864 Treaty within the reservation as it existed following the 1906 Act. Hence, the assertion that Article IV preserved the Tribe's right to regulate fishing, hunting and gathering on the ceded lands because exercise of these rights is consistent with the *purposes* of the 1906 Act and the subsequent *status* of the lands ceded, is not based upon the actual language of Article IV.

The cases and treaties cited by the Tribe (*e.g.*, Tribe's Br. at 19, 22) are inapposite because they involve fact situations not present in the instant case. The legal authorities mistakenly relied upon fall into one of the following three categories: (1) Litigation in which the original treaty expressly reserved or was construed as reserving off-reservation fishing and hunting rights. *E.g.*, *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974); *State v. Tinno*, 94 Id. 759, 497 P.2d 1386 (1972). (2) Disputes in which the cession agreement or other act expressly reserved fishing and hunting rights on the ceded land. *E.g.*, *Antoine v. Washington*, 420 U.S. 194 (1975); *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 53 (1983); *Kimball v. Callahan*, 590 F.2d 768 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979). (3) Matters in which the cession agreement did not effect a diminishment of reservation boundaries. *E.g.*, *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 707 (1984).

None of these three situations is presented here: (1) the 1864 Treaty did not reserve off-reservation fishing and hunting rights; (2) the Cession Act did not expressly reserve fishing, hunting and trapping rights on the ceded land; and (3) the Cession Act here *did* effect a diminishment of the reservation boundaries. The cited cases, thus, do not support directly or by implication the argument that on-reservation treaty rights continue on lands ceded in a diminishment of reservation boundaries when the cession act has not expressly reserved treaty rights on the ceded land.[1]

[1] To the extent that the cases and treaties are advanced to substantiate the proposition that the right to hunt free of state regulation does not depend upon a possessory interest in the underlying land, they clearly are not on point. The State does not assert that the two interests are ineluctably joined. The State contends solely that given the facts in this case, the Tribe did not retain the regulatory right it asserts. In any event, the Ninth Circuit,

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This Court has not ruled expressly on the precise issue presented, but both sides rely on its decision in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The Tribe asserts that "*Rosebud* establishes that the question of diminishment is separate from the question of whether, notwithstanding diminishment, any beneficial interest has been retained" in ceded lands. (Tribe's Br. at 27). However, the "beneficial interest" to which this Court referred in footnote 24 of its opinion is the beneficial interest that a tribe may retain following a cession act until the tribe receives payment for the ceded land. *See Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 101-02 (8th Cir. 1975) (citing *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920)). In *Rosebud*, the cession agreement provided for payment to the tribe as the ceded lands were sold. Until sold, the tribe retained a beneficial interest in the land. In the present case, the Tribe has been paid for the ceded land and, therefore, retains no beneficial interest in the land.

In the absence of controlling authority from this Court, the parties have looked to the Eighth Circuit's decision in *Red Lake Band of Chippewa Indians v. State of Minnesota*, 614 F.2d 1161, *cert. denied*, 449 U.S. 584 (1980). The Tribe misreads *Red Lake Band*, when it asserts that the right at issue

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held, relying on this Court's ruling in *Menominee Tribe v. United States*, 391 U.S. 404 (1968), that the Tribe's right to hunt and trap on its reservation land was premised on its treaty right to hold the reservation land as a home. *Kimball v. Callahan*, 493 F.2d 564, 565 (9th Cir.) *cert. denied*, 419 U.S. 1019 (1974). It logically follows that if those lands are no longer used as a home for the Tribe because they are sold to the United States and no longer part of the reservation, the derivative right to hunt and trap falls with its source, the right to occupy the lands as a home.

was a right to hunt "over the objection of the landowner on land which has been opened for settlement," whereas the right asserted here is to "hunt and fish free of state regulation on national forest lands or private forest lands with the consent of the landowners." (Tribe's Br. at 25-26.) As the Eighth Circuit's decision in *Red Lake Band* makes clear, state regulation was the issue:

> The Band seeks now to free its members of the *state's control*, by contending that its grant of rights, title and interest in the land to the United States did not include hunting, fishing, trapping and wild rice gathering rights. We disagree.
>
> . . . We agree with the district court's conclusion that the Red Lake Band gave up its rights to hunt, fish, trap and gather wild rice *free of the state's regulation of such activities*. . . .

614 F.2d at 1162 (emphasis added).

The Tribe also asserts that the Eighth Circuit in *Lower Brule Sioux Tribe v. State of South Dakota*, *supra*, distinguished *Red Lake Band* on the basis that the "right to hunt and fish free of state regulation is a right separate and apart from an interest in the property itself," and on this ground affirmed the tribal right to fish and hunt on land taken by the federal government for water projects. (Tribe's Br. at 24). It is true that the Eighth Circuit distinguished *Red Lake Band* from *Lower Brule*, but it did not draw the distinction the Tribe posits. The Tribe's quotation from the *Lower Brule* opinion at pages 24-25 of its brief omits the critical portion of the quote and opinion. The sole basis on which the Eighth Circuit distinguished the two cases was that the cession act in *Red*

Lake Band diminished the reservation, whereas the acts construed in *Lower Brule* did not. (*See* the State's opening brief at pages 26-27). The Eighth Circuit in *Lower Brule* emphasized that when a cession act does not diminish the reservation, use of language in the act "referring to the 'entire interest' or 'all claims' in certain land falls short of stating a clear purpose to abrogate specific treaty rights." 711 F.2d at 822-23.

It was in the context of a *non-diminishment* case, therefore, that the Eighth Circuit stated that "treaty hunting and fishing rights are severable from their treaty rights to *exclusively* own, occupy and utilize the land granted to them as a reservation." 711 F.2d at 823 (footnote omitted) (emphasis in original). Had the acts in *Lower Brule* diminished the reservation, the Eighth Circuit appropriately would have held, consistent with its earlier *Red Lake Band* decision, that the Lower Brule's treaty-reserved fishing and hunting rights were lost on the ceded lands. In misreading *Lower Brule* and in misanalyzing the present case, the Tribe glosses over the critically important fact of diminishment of reservation boundaries and the role diminishment plays in analyzing a question of retention of treaty-reserved fishing and hunting rights on ceded land.

CONCLUSION

The on-reservation nature of the treaty rights and the subsequent diminishment of reservation boundaries are critical factors in the analysis and resolution of the issue in this case. The lower court improperly disregarded these factors. It erroneously focused on the issue whether retention of

treaty rights on the ceded, off-reservation land is inconsistent with the purposes of the 1906 Act and the subsequent uses of the ceded land. (*See* Pet. for Cert. at App-6 - App-7). The Tribe's argument similarly ignores these factors as well as the terms of the 1906 Cession Act by which they conveyed all their interest and relinquished all claims and demands arising out of the ceded land.

In 1906 the Klamath and other tribes made a bargain with the federal government. No justification for allowing the Tribe to avoid the clear legal consequences of that bargain has been advanced. The Tribe was represented in the negotiations by articulate, intelligent, English-speaking tribesmen. Indian Agent McLaughlin explained the cession agreement to the Tribe, and the Tribe was represented by counsel. (*See* State's Br. at 43-44, n. 12). Under these circumstances, the conclusion is inescapable that the Tribe relinquished its exclusive fishing, hunting and trapping rights on the ceded land, and that its rights are subject to state regulation. The contrary decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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